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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Brief of the State of California, Amicus Curiae, In Support of Petitioners

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THE INTEREST OF AMICUS CURIAE

Supported by a decision of its highest court,[1] The State of Ohio and thousands of its employees, petitioners, come before this Court for a resolution of whether the Economic Stabilization Act of 1970, as amended,[2] may be applied to the sovereign states

[1] *Fry* v. *Ferguson, State ex rel. Boehm* v. *Legatt, State ex rel. Kaiser* v. *Ferguson*, 34 Ohio St.2d 252, 298 N.E.2d 129 (1973).

[2] Pub. L. 91-379, 84 Stats. 797; Pub. L. 92-10, 85 Stats. 743; Pub. L. 93-28, 87 Stats. 28. The text of the Act is contained in the Note to 12 U.S.C.A. § 1904 (1973 Poc. Pt.).

under the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3). Pivotal to the Court's disposition of this principle issue are two further considerations, namely (1) whether in fact Congress intended the wages and salaries of State employees to be subject to the Act, and if so, (2) whether Congress had a rational basis for doing so.

Petitioners appeal by way of petitions for writs of certiorari a decision of the Temporary Emergency Court of Appeals in *United States* v. *Ohio,* 487 F.2d 936 (Em.App. 1973), wherein each of these three inquiries were answered in the affirmative. A permanent injunction was issued against the State of Ohio and its officers from paying the full wage and salary increases provided in the Ohio Pay Bill (Senate Bill 147, Section 143.10(A), Ohio Revised Code). A decision of the Ohio Supreme Court (see footnote 1, *supra*) was overruled *sub silentio.*

The California experience under the Economic Stabilization Act closely parallels that of the State of Ohio. On June 30, 1973, the California State Budget Act of 1973 (Calif. Stats. 1973, Chap. 129) was signed into law by Governor Ronald Reagan, providing for wage and salary increases for approximately 204,000 State employees.[3] The increase, an

[3] Annual appropriations in the California budget provides for the wages and salaries of approximately 125,000 State civil service and exempt-appointed employees, 1,400 employees of the State Legislature, and 78,000 academic and nonacademic employees of the University of California and the California State University and Colleges.

overall average of approximately 11.6 percent, included a "catch up" raise of 6 percent for the year 1971, in which State employees received no increase.[4] For budgetary reasons, the Governor vetoed a proposed salary increase of 8 percent and asked each employee to "tighten his belt", promising to correct the inequity in better times. Indeed, at the end of the subsequent fiscal year on June 30, 1973, the State enjoyed a surplus in excess of 800 million dollars, and State employees received the first of a promised two-part salary "catch-up". The initial increase, however, still left a significant lag as determined by salary surveys undertaken semi-annually by California's State Personnel Board. Accordingly, the Governor made a commitment to restore the remainder of the lag in the second of the two-part "catch-up" by providing sufficient salary funds for the 1973–1974 fiscal year, an increase of approximately 11.6 percent. The proposed increase was reported to the Cost of Living Council (hereinafter "Council") on July 23, 1973, in accordance with the Council's applicable "Phase III" regulations (6 C.F.R. § 130.1, *et seq.*).

Thereafter, on July 5 and July 24, 1973, the Council issued Notices of Challenge to the proposed wage and salary increase pursuant to section 130.92 of "Phase

[4] The salaries of California's employees are based on "prevailing rates for comparable service in other public employment and in private business." Calif. Government Code, § 18850. In 1971, although California state employees went without wage and salary increases, employees of the Federal government and in private industry received increases amounting to 6 and 6.6 percent, respectively.

III" regulations, and issued a Temporary Order restraining the payment or implementation of said wages and salaries under section 130.93 of said regulations. By request, on August 7, 1973, the State of California was granted a public hearing before the Council in Washington, D.C. On August 29, 1973, a Decision and Order of the Council ordered a reduction of the proposed wage and salary increase to 7 percent. A formal Request for Review, filed by the State of California on September 8, 1973, was denied by a further Decision and Order of the Council, dated February 4, 1974.

On January 7, 1973, the State of California in *California* v. *United States,* No. Civ. S74-17, filed an action in the United States District Court for the Eastern District of California, seeking to restrain enforcement of the Council's Decision and Order by a writ of injunction and to obtain a judgment declaring the Act and regulations unconstitutional as applied to the State of California. See § 211, Economic Stabilization Act. Among other allegations, the State has raised the issues of whether Congress intended the Economic Stabilization Act to apply to the States and, if so, whether Congress had the constitutional authority to impose economic controls over State wages and salaries in light of sovereignty guaranteed to the States under the Tenth Amendment to the United States Constitution. The United States on March 8, 1974, filed its motion for summary judgment. The State's opposition thereto will be heard

on May 28, 1974. (Hon. Philip C. Wilkins, District Judge.)[5]

In the midst of federal litigation in California, on April 19, 1974 the California Supreme Court issued its decision in *Coan, et al.* v. *State of California,*— Cal.3d—, a true and correct copy of which is included herein as an Appendix. As in the Ohio cases (see footnote 1, *supra*), the action sought a peremptory writ of mandate compelling the appropriate California officials to implement the California Budget Act of 1973 (Calif. Stats. 1973, Chap. 129). Finding jurisdiction to hear the case over the demurrer of the State respondents, and ordering the issuance of the peremptory writ,[6] the Court concluded that the substantive provisions of the Economic Stabilization Act were not applicable to state salaries. Justice Mosk, taking a "firm constitutional stand for state independence in its governmental function" (Appendix), concurred with the majority solely on the basis of the Tenth Amendment to the United

[5] These issues have been raised in yet another federal lawsuit in which the same State officials, as well as the United States, are *defendants*. The case concerns the identical constitutional issues here as to a 1 percent reduction ordered by the Council for the 1972–1973 fiscal year. All parties, including the United States, have answered the Complaint and a pretrial conference has been set for June 3, 1974. *State Trial Attorneys* v. *Flournoy, et al.*, No. 73-1514-R, United States District Court, Central District of California (Hon. Manuel Real, District Judge).

[6] As of this date, the United States has not sought injunctive relief against the state officials in the *Coan* matter. Funds necessary to implement the 1973 Budget Act, approximately 70 million dollars, are currently held in trust by California's Director of the Department of Finance, Verne Orr, by special legislation. Calif. Stats. 1973, Chap. 1136.

States Constitution. This recent decision dramatizes the magnitude of the issues and the public importance of their prompt resolution before this Honorable Court.

With the exception of the limited argument which follows, the State of California adopts as its position before this Court the majority and concurring opinions of the California Supreme Court in *Coan, et al.* v. *State of California, supra,* and joins the petitioners and the State of Ohio in seeking reversal of the decision of the Temporary Emergency Court of Appeals below (487 F.2d 936).

ARGUMENT

I. In the Absence of Express Words in the Statute, the Economic Stabilization Act Should Not Be Applied to Ohio, a Sovereign State, Unless There Are Extraneous and Affirmative Reasons for Believing That Ohio and the Other Sovereign States Were Intended to Be Affected.

The California Supreme Court in *Coan, et al.* v. *State of California,*—Cal.3d—(Appendix), has concluded that in the absence of express words in the statute, Congress did not intend in promulgating the Economic Stabilization Act to regulate the internal affairs of the State of California. The same rationale applies equally to the State of Ohio and the other sovereign states.

It is well settled that federal statutes which in general terms divest preexisting rights or privileges will not be applied to a sovereign in the absence of ex-

press words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected. *United States* v. *United Mine Workers,* 330 U.S. 258, 272–273 (1947); *United States* v. *Wittek,* 337 U.S. 346, 359 (1948); *Parker* v. *Brown,* 317 U.S. 341, 350–351 (1943).

In *United States* v. *United Mine Workers, supra,* the concurring opinions of Justices Black and Douglas discussed application of the Norris-LaGuardia Act (limiting the use of injunctions in labor disputes) to the federal government as an employer. The majority had already observed that the Act's provisions did not apply. Justices Black and Douglas added (330 U.S. at 328–329):

> "Congress never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense."

The same result should obtain here. Specific congressional language is required if the Federal government is to be allowed to "embark upon such a novel program" of dictating the amount of money a State pays to its employees. No part of the Economic Stabilization Act mentions, or for that matter even sug-

gests, that Congress intended the States to be subject to the provisions of the Act. The decisions of the California and Ohio Supreme Courts on this issue are sound. They indicate the desire of the courts to avoid creating a dispute between Congress and the states where none should exist. As the Court stated in *Davis Warehouse Co.* v. *Bowles,* 321 U.S. 144, 152 (1944): "Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision."

The conflict, if any, arises by virtue of the decision of the Temporary Emergency Court of Appeals below (487 F.2d 936). However, the lower court's decision cannot withstand close analysis, as demonstrated by the California Supreme Court's opinion in *Coan, et al.* v. *State of California* (Appendix). Little would here be served by a restatement or reargument of the views of the California Supreme Court relative to the misplaced reliance of the Temporary Emergency Court of Appeals on certain rules of administrative construction, statutory history, and the cases of *Case* v. *Bowles,* 327 U.S. 92 (1945), *United States* v. *California,* 297 U.S. 175 (1936), and *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143 (8th Cir. 1971), aff'd per curiam, 405 U.S. 1035 (1972). Accordingly, the State of California defers to the opinion of its own high court on each of these issues.

Conspicuously absent from the decision of the lower court is a discussion of this Court's opinion in *Employees of the Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973), decided a full six months before the decision below. There, this Court addressed itself to a question reserved in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), *viz.,* whether by reason of certain 1966 amendments to the Fair Labor Standards Act of 1938 (52 Stat. 1069, as amended, 19 U.S.C. § 216(b)) the States were subject to suit in federal court by State employees. Holding that the State continued to enjoy its constitutional immunity from suit under the Eleventh Amendment, the Court stated (411 U.S. at 284–285):

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. *Congress, acting responsibly, would not be presumed to take such action silently.* The dramatic circumstances of the *Parden* [*Parden* v. *Terminal R. Co.,* 377 U.S. 184 (1964)] case, which involved a rather isolated state activity can be put to one side. *We deal here with problems that may well implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a*

State's governmental hierarchy.[7] Those who follow the teachings of *Kirschbaum* v. *Walling, supra* [316 U.S. 517], and see its manifold applications will appreciate how pervasive such a new federal scheme of regulation would be.

"But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." (Brackets and Italics added).

Amicus State of California similarly urges that Congress, acting responsibly, would not be presumed to apply the Economic Stabilization Act to the sovereign states by mere silence. In the further words of this Court in the *Employees* case, *supra* (411 U.S. at 285):

"It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired *silently* to deprive the States of an immunity they have long enjoyed under another part [Eleventh Amendment] of the Constitution." (Brackets and Italics added).

[7] Compare this language with that of Justice Mosk, concurring in *Coan, et al.* v. *State of California* (Appendix):

"If we examine application of this federal act [Economic Stabilization Act] in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state." (Brackets added).

Nor should the sovereignty guaranteed to the States under the Tenth Amendment, "another part of the Constitution," be deprived by the silence of Congress.

II. The Economic Stabilization Act Cannot Be Applied to the States Under the Commerce Clause so as to Regulate Indispensible Sovereign Functions Which Have No Rational Connection With Commerce.

Justice Mosk, concurring in *Coan, et al.* v. *State of California* (Appendix) fully articulates the position of the State of California relative to its contention that by virtue of the Tenth Amendment Congress may not constitutionally regulate state wages and salaries under the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3).

In *Employees of the Department of Public Health and Welfare* v. *Missouri, supra,* 411 U.S. 279 (1973), this Court distinguished its prior cases (*Parden* v. *Terminal R. Co.,* 377 U.S. 184 (1964)) which upheld under the Commerce Clause federal regulation of certain State activities operated "for profit" (411 U.S. at 284).[8] The Court refused to place the State in the position of a "proprietary" employer or to cause

[8] State activities have never been totally immune from regulation where such activities were "proprietary", i.e. activities which were or could be performed by private enterprise. See, e.g., *California* v. *Taylor,* 353 U.S. 553 (1957); *California* v. *United States,* 320 U.S. 577 (1944); *United States* v. *California,* 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois* v. *United States,* 289 U.S. 48 (1933); *Sanitary District* v. *United States,* 266 U.S. 405 (1925).

the State to surrender its Tenth Amendment sovereignty (411 U.S. at 286–287):

> "It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear.*" (Italics added.)

It similarly follows that the States should not be treated on the same footing as other "employers" for purpose of regulation under the Economic Stabilization Act. The activities undertaken by the governments of the several states are principally "governmental", not "proprietary". If the State ceased to perform such services[9] it is unlikely that private enterprise would step in to fill the need. *Ibid.*, 411 U.S. at 826.

As early as 1824, Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, said:

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

[9] Consider, for example, State activities staffed by prison personnel, highway patrolmen, meat food inspectors, narcotic agents, park rangers, licensing personnel, historian specialists, fire prevention officers, highway equipment mechanics, tax compliance supervisors, water use analysts, airport environmentalists, property appraisers, and regulatory inspectors and examiners, to name a few.

See *Perez* v. *United States*, 402 U.S. 146, 150–151 (1971).

The search for a "dependable touchstone" by which to determine whether State employees are engaged in commerce or in the production of goods for commerce "is as rewarding as an attempt to square the circle." *Kirschbaum* v. *Walling*, 316 U.S. 517, 520 (1942). The crucial test, however, would appear to be the nature of the activities of the employee and the character of his work. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571–572 (1943). It needs no extended argument to demonstrate that the better part of the activities of State employees are purely intrastate in nature. In no case to the knowledge of the State of California has this Court found a connection with interstate commerce on the bold assertion by the government that it is so. In each and every case reviewed,[10] there was a significant probe into those facts which could conceivably form a rational basis for the federal statute in question.

[10] See, for example, *Maryland* v. *Wirtz*, *supra*, 392 U.S. 183 (1968); *Heart of Atlanta Motel, Inc.*, v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Darby*, 312 U.S. 100 (1941).

Amicus State of California recognizes that although the activities performed by State employees are for the most part "governmental", that there may be those employees who perform purely "proprietary" functions (as in *Maryland* v. *Wirtz*, *supra*, 392 U.S. 185 (1968) and *United States* v. *California*, *supra*, 297 U.S. 175 (1936)). A statute can be supported even when applied to individual members of the class whose own activities ("governmental" in nature) may not have any demonstrable impact on interstate commerce (such as those who perform "proprietary" functions). See *Perez* v. *United States*, *supra*, 402 U.S. 146, 152–154 (1970); *United States* v. *Hunter*, 478 F.2d 1019, 1021 (7th Cir. 1973); *Mandina* v. *United States*, 472 F.2d 1110, 1113 (8th Cir. 1973). However, to say that Congress should be permitted to control *all* sovereign functions on the basis of the presence of a small number of "proprietary" activities by State government is to subvert the holdings of this Court which require that the means selected to combat a national evil under the Commerce Clause be reasonable and appropriate. *Heart of Atlanta Motel, Inc.* v. *United States*, *supra*, 379 U.S. at 258.

The decision of the Temporary Emergency Court of Appeals below relies on one of its own decisions, *Murphy* v. *O'Brien*, 485 F.2d 671 (Em. App. 1973), as well as *Maryland* v. *Wirtz*, *supra*, 392 U.S. 183 (1968), for the proposition that Congress can engage in an "incidental interference" with State affairs under the Commerce Clause provided that there is a

rational basis for regarding the statute as a regulation of commerce.

The distinguishable "proprietary" nature of the activities upon which *Maryland* v. *Wirtz*, *supra*, was predicated has already been discussed. There, the Court stated (392 U.S. at 197):

> "If a State is engaging in economic activities that are validly regulated by the Federal Government *when engaged in by private persons*, the State too may be forced to conform its activities to federal regulation." (Italics added.)

The minimum wage and overtime provisions of the Fair Labor Standards Act, as applied to the "proprietary" activities of State hospital, school and railroad employees (29 U.S.C. § 203(d)), should hardly be extended to *all* "governmental" activities. For this same reason, amicus State of California takes exception to the holding of the court below that application of the Fair Labor Standards Act will have less impact on the States than will the Economic Stabilization Act.

In the second case cited below, *Murphy* v. *O'Brien*, *supra*, 485 F.2d 671 (Em. App. 1973), the Temporary Emergency Court of Appeals relied in part on limitations on the *taxing* power as discussed in *New York* v. *United States*, 326 U.S. 572 (1946). Chief Justice Stone (concurring) stated that even a nondiscriminatory tax might face constitutional objection if it "unduly interferes with the performance of the State's functions of government." *Ibid.*, 326 U.S. at

588. Mr. Justice Frankfurter stated for the majority (326 U.S. at 582):

> "... [S]o long as Congress generally taps a source of revenue by whomsoever earned *and not uniquely capable of being earned only by a State*, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." (Italics added.)

A State has a valid interest in preserving the fiscal integrity of its programs, and may legitimately limit its expenditures, whether for public assistance, public education, or any other purpose. *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). In the same fashion, what a State pays its employees is an indispensible sovereign function of State government, upon which the integrity of all of its various programs depends. The services of such employees are irreplaceable. State government must therefore have wide discretion in the payment of salaries to employees few of which "earn more than enough to pay their expenses from month to month. See *Sampson* v. *Murray*, ---- U.S. ---- (1974) (dissenting opinion)." *Arnett* v. *Kennedy*, ---- U.S. ----, 42 U.S. Law Week 4513, 4526 (1974) (dissenting opinion by Marshall, J.).[11]

[11] Economist John Kenneth Galbraith has noted that the most nearly unrelieved victims of inflation, apart from those living on pensions or other fixed provision for personal security, are those who work for the State. The pay scales of such employees are highly formalized, and traditionally have been subject to revision only at lengthy intervals. Thus inflation does not automatically bring added revenues to pay higher salaries and incomes of such workers. Galbraith, *The Affluent Society*, pp. 264–266 (1960).

The Constitution of California (Art. XXIV, § 3(a)) vests enforcement of the State Civil Service Act (Calif. Govt. Code, Tit. 2, Div. 5, § 18000 et seq.) exclusively in the California State Personnel Board. Salaries as such are set by the Board under California Government Code section 18850, which provides *inter alia:*

> " . . . The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business."

The setting of California's state salaries, as in other jurisdictions (see, e.g., 5 U.S.C. § 5301),[12] involves extensive research and surveys by the State Personnel Board, followed by further review by the Director of Finance and the Governor who make a final recommendation to the California Legislature. As a

[12] The setting of *federal* pay rates are determined under a system whereby the President annually determines the pay adjustment required to maintain comparability (See Federal Salary Reform Act of 1962, Pub. L. 87-793; and Federal Pay Comparability Act of 1970, Pub. L. 91-656) with the private sector, and puts this adjustment into effect, normally in October. The President is guided by recommendations submitted by the Director of the Office of Management and Budget and the Chairman of the United States Civil Service Commission, acting jointly as the President's Federal "pay agent." The pay agent's responsibility is to review the results of the annual survey of the private sector pay conducted by the Bureau of Labor Statistics, U.S. Department of Labor, and to compute the recommended comparability pay increase therefrom.

result, employees' salaries generally lag prevailing rates from three to fifteen months. Hence, the limitation of salaries in the private sector are automatically reflected in the salaries of public employees.

Separate and distinct legislative treatment has been accorded public employees in California, who "occupy a status in relation to their employer different from that of their private counterparts." *California Federation of Teachers* v. *Oxnard Elementary School,* 272 Cal.App.2d 514, 521 (1969). The rates of pay and working conditions of public employees in California, as elsewhere, are fixed by State statutes and administrative regulation, not by "free competitive enterprise" (See Pub. L. 92-210, Sec. 4(b)(1), "National Productivity Policy", a part of the Economic Stabilization Act of 1970) or by "contract" (See § 203, Economic Stabilization Act).

Application of the Economic Stabilization Act to State employees would therefore constitute an unprecedented interference with the traditional method of fixing the salaries of such employees. Congress no more intended to interfere with such sovereign functions than it did with respect to federal employees who are exempt from economic controls, both by statute (Economic Stabilization Act, "Federal Employee Compensation", Sec. 3) and regulation ("Phase III" Regulations, § 130.34; 6 C.F.R. 18). By reason of application of the Economic Stabilization Act to the States, in the five-year period from 1969 to 1973, federal employees received salary in-

creases (not compounded) of *36.5* percent [13] while employees of the State of California received but *26.2* percent [14] (not compounded) in salary increases. Certainly Congress did not intend to encourage such disparity among the salaries of public workers.

CONCLUSION

For these reasons, the decision of the Temporary Emergency Court of Appeals should be reversed.

Respectfully submitted,

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May 1974.

[13] See Pub. L. 90-206 and Executive Order No. 11474 (9.1 percent); Pub. L. 91-231 (6.0 percent); Pub. L. 91-656 (6.0 percent); Pub. L. 92-210 (5.5 percent); Pub. L. 91-656 and Executive Order 11691 (5.1 percent); Pub. L. 91-656 and Executive Order No. 11739 (4.8 percent). See *Recent Federal Personnel Cost Trends,* Government Finance Brief No. 24 (Tax Foundation Inc., 1974).

[14] This figure *includes* the 7 percent increase allowed by the August 1973 Decision and Order of the Council.

APPENDIX

SUPREME COURT
FILED
APR 19 1974
G. E. BISHEL, Clerk
----------Deputy

APPENDIX

COPY

In The Supreme Court Of The State Of California In Bank

JAMES COAN et al., *Petitioners,* v. THE STATE OF CALIFORNIA et al., *Respondents.*	Sac. 7987

A state employee, on behalf of himself and others, and the California State Employees' Association petition for peremptory writ of mandate compelling California officials to prepare a payroll and to pay wage increases in accordance with the California Budget Act of 1973. (Stats. 1973, ch. 129.) We issued an alternative writ.[1]

[1] A motion to intervene by the United States of America was denied by this court on 26 September 1973, but permission was granted to file an amicus curiae brief.

SEE CONCURRING AND DISSENTING OPINIONS

The Budget Act of 1973 includes appropriations for an average increase in state salaries of 11.5 percent.[2] However, the Cost of Living Council (council) filed notice of challenge and an order temporarily restraining payment of the increase. Following hearing on 29 August 1973, the council allowed only a 7 percent increase, and the California Director of Finance promptly filed his objections.

The question whether the council is authorized by Congress to limit state salaries was not raised at the council hearing. Rather, California argued that state salaries are based on comparable jobs in other sectors of the economy, that lengthy proceedings to determine comparability create a 4- to 16-month lag, that the salary increase proposed by the Budget Act of 1973 will not bring state employee salaries up to other government and private sector levels, and that, when viewed over a period of years, the state increases are not inconsistent with council standards. It was further pointed out that when Governor Reagan vetoed a pay raise for budgetary reasons in 1971, he recognized the raise was warranted and would be restored when funds became available.

Petitioners contend the council is not empowered by statute to regulate the internal affairs of a sovereign state and therefore may not control salaries paid state employees.[3] Respondents demur, claiming exclusive jurisdiction lies in the district courts of the

[2] The percentage figures used by the parties vary slightly because of differences in methods of computation.

[3] By letter to this court, the Governor has joined in the contention that Congress did not authorize the council to regulate salaries of state employees. The Governor also questions whether Congress may constitutionally regulate such salaries.

United States under section 211(a) of the Economic Stabilization Act of 1970 (the act)[4] and that a defect in parties exists by failure to join the council. In addition to claiming lack of jurisdiction, the United States of America asserts that Congress empowered the council to regulate state salaries.

The Act

Section 203(a) of the act authorizes the President to stabilize wages, section 204 permitting him to delegate such power to boards or commissions. Section 209 allows the Attorney General to enforce the act through restraining order and injunction in the federal courts.

Section 210 provides: "Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages."

Section 211 provides: "The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations of orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the

[4] The act may be found in the 1973 pocket part of 12 United States Code Annotated, following Section 1904.

constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28]."

Section 211 further provides a Temporary Emergency Court of Appeals with exclusive jurisdiction over appeals from district courts in cases arising under the act.

Subject Matter Jurisdiction

We are satisfied that when sections 209, 210, and 211 are read together (as they must be), they do not preclude jurisdiction over this action by the California courts.

Section 209 only provides for federal jurisdiction in actions by the Attorney General. Therefore it does not provide federal jurisdiction in this case.

Section 210, providing for federal jurisdiction in litigation brought by individuals, may not be interpreted as providing for federal jurisdiction in actions by them against a state. The decision at the last term in Employees of Dept. of Public Health & Welf. v. Missouri (1973) 93 S.Ct. 1614, 1618 is controlling.

In that case employees sought overtime compensation from Missouri under the Fair Labor Standards Act. Although Congress had expressly manifested its intent to bring the state employees involved within the substantive provisions of the statute, the United States Supreme Court held that, in the absence of ex-

press language providing that states were subject to the federal court remedies given employees generally, Congress did not intend states to be subject to those remedies. Similarly, here the absence of express provision for actions against a state by persons suffering legal wrong requires the conclusion that Congress never intended section 210 to authorize federal jurisdiction in actions by such persons against a state.

Since neither section 209 nor section 210 may be read as providing federal court jurisdiction for the instant action, section 211 may not then be interpreted as mandating exclusive federal jurisdiction. Coming immediately after two sections granting jurisdiction to the federal courts, section 211, providing for exclusive jurisdiction in the federal courts, must be read in the light of the preceding sections. It would be unreasonable to conclude that an action is restricted to the federal court when the federal court has not been given jurisdiction. Any doubt is disspelled by the crucial words in the three sections being almost identical: "order or regulation under this title" (§ 209); "arising out of this title or any order or regulation issued pursuant thereto" (§ 210); and "arising under this title or under regulations or orders issued thereunder" (§ 211).

Were not the statutory pattern so clear, practical considerations would in any event require the conclusion that Congress did not intend to preclude state court jurisdiction over the instant action. The absence of state jurisdiction would mean that state employees would be unable to sue their state to recover salaries when the act has been placed in issue.

An unconsenting state is immune from federal court suits brought by its own citizens and citizens of other

states. (U.S. Const., Amend. XI; Edelman v. Jordan (1974) ____U.S._____ (42 U.S.L.Week 4419; Employees of Dept. of Public Health & Welf. v. Missouri, *supra*, 93 S.Ct. 1614, 1616; Hans v. Louisiana (1890) 134 U.S. 1, 9 et seq.) Although consent to federal court suit may be implied on the basis of interstate activities by a state, the implication of state consent may not be founded upon an act "wholly within its own sphere of authority." (Parden v. Terminal R. Co. (1964) 377 U.S. 184, 196; Employees of Dept. of Public Health & Welf. v. Missouri, *supra*, 93 S.Ct. 1614, 1617.) Since that sphere encompasses the activities of most state employees, they are precluded from suing in federal court. It does not appear reasonable to imply an intent to Congress to deprive the employees of their right to sue in state courts, thereby denying them a forum in cases where the issues include council regulations.

It should also be pointed out that, as we shall see, the substantive provisions of the act are not applicable to state salaries, and, although not necessarily determinative, this provides a further reason to conclude the exclusive jurisdiction provisions of section 211 are not applicable here.[5]

Original Jurisdiction

Because the instant case presents an important issue of federal-state relationship, is of importance to numerous persons including all state employees, and affects the public fisc and the state's ability to compete in the labor market, we deem it appropriate to exercise our original jurisdiction pursuant to article VI, section 10 of the California Constitution. (San Francisco United School District v. Johnson (1971) 3 Cal.3d 937, 944–945; County of Sacramento v. Hickman (1967) 66 Cal.2d 841, 845.)

[5] Having concluded the instant case does not come within the exclusive jurisdiction provision of section 211, it is unnecessary to reach the question whether this action falls within the section's exception for state court jurisdiction subject to a right of removal. (Removal has not been sought herein.)

Although a claim for payment of salary is in effect a money claim, mandamus is a proper remedy where the dispute concerns the proper construction of a statute or ordinance giving rise to the official duty to pay the salary claim. (Tevis v. City & County of San Francisco (1954) 43 Cal.2d 190, 198.) No reason appears to distinguish cases where, as here, the dispute concerns validity of the statute providing for the salary.

Defect in Parties

Respondents' claim that the United States of America is an indispensable party is refuted by the authority cited, a decision of the Temporary Emergency Court of Appeals which recognizes the United States is not an indispensable party to every action involving council regulations. That case recognizes the council need not be joined if its interests are properly represented. (See pp. 12–13 of respondents' opposition.) We have permitted the United States to file as amicus curiae. In a similar case the Ohio Supreme Court also held that omission of the United States as a party did not cause a defect in parties. (State ex rel. Fry v. Ferguson (Ohio 1973) 298 N.E.2d 129, 131–132.)

Application of the Act

The act does not expressly provide for regulation of state employee salaries. The only provision bearing

on state regulation declares state rent regulating does not exempt rents from the act.

Relative to the recurring question whether federal legislation failing to mention the states is nevertheless applicable to the states, the settled rule is that an unexpressed purpose of Congress to set aside state regulation of internal affairs is not lightly to be inferred. (E.g., Penn Dairies v. Milk Control Comm'n (1943) 318 U.S. 261, 276; Parker v. Brown (1943) 317 U.S. 341, 351.)[6] A related, settled rule is "that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." (United States v. Mine Workers (1947) 330 U.S. 258, 272.) The viability of these rules is reflected by the decision of the United States Supreme Court at the last term in Employees of Dept. of Public Health & Welf. v. Missouri, *supra,* 93 S.Ct. 1614.

As illustrated by the last-cited case, the rules have "been emphatically and most commonly announced under statutes whereby it is asserted that the government is amenable to suit." (3 Sutherland, Statutory Construction (3d ed., Horack ed. 1943) § 6301, p. 188.) The principles apply with even greater force when an administrative tribunal is claiming a state is subject to its jurisdiction so that it may totally or partially invalidate state laws.

Two exceptions to the above rules have been recognized but are inapplicable here. In cases coming within the exceptions the courts have looked to rules

[6] A similar rule is applied to enactments of our Legislature. (State of California v. Marin Mun. W. Dist. (1941) 17 Cal.2d 699, 704–705.)

of construction and matters extrinsic to the statute in determining whether general federal legislation is applicable to the states. The first exception is for regulation of activities constituting a proprietary rather than a governmental function. (United States v. California (1936) 297 U.S. 175, 186; Ohio v. Helvering (1934) 292 U.S. 360, 370; 3 Sutherland, Statutory Construction, *supra,* § 6302, p. 193.) Here there is more than proprietary activity since the council's order extends to substantially all state employees, including those engaged in governmental functions.

The second applies where the objective of the statute could not be accomplished without including the government. (California v. United States (1944) 320 U.S. 377, 385; 3 Sutherland, Statutory Construction, *supra,* § 6302, p. 193.) Regulation of state employee salaries is not essential to the act's purpose of limiting inflation. Taxpayers' concerns obviously provide an effective brake on state employee salary increases. Although such increases may contribute to increased inflation, it is obvious that, where national guidelines on salary increases are established, political considerations require state employee salaries be justified in light of both the state economy and federal policy. The conclusion that the second exception is inapplicable is supported by experience as well as reason. During both World War II and the Korean War governmental employees' salaries were administratively exempt from regulation. (See 117 Cong. Rec. § 19949 (1971).) Moreover, because governmental salaries such as California's are ordinarily based on comparable jobs in other sectors of the economy (see

e.g., 5 U.S.C. § 5301; Gov. Code, § 18850), limitation on the latter will effectively limit the former.[7]

The United States argues that proceedings of Congress reflect an intent to make the act applicable to state employee salaries. It does not claim the *original* proceedings reflect that intent—rather, it asserts that *subsequent* proceedings in 1971 to amend and extend the act reflect such intent. (The Economic Stabilization Act Amendments of 1971, 85 Stat. 743.)[8]

However, in the absence of some ambiguity in the statute, revelations of statutory history may not overcome the settled rule excluding states from general federal laws. Aside from cases coming within the two exceptions discussed above, the only case cited or found where the Supreme Court held congressional intent to regulate internal affairs of the state could be established by implication is Case v. Bowles (1945)

[7] The foregoing consideration is reflected by the regulation of federal employee salaries. In a statute adopted at the same time as the 1971 amendments, Congress provided that comparability adjustments of federal employee pay under 5 United States Code section 5305 based on the 1971 Bureau of Labor Statistics Survey shall not be greater than Cost of Living Council guidelines established for private industry. The statute did not limit other pay increases, and apparently only the January 1972 increases were affected. In May 1972 Congress in effect reversed itself as to adjustments based on prevailing wage rates, abrogating the limitation placed on adjustments and providing for retroactive pay increases to federal employees based on wage surveys, notwithstanding the executive orders establishing the Cost of Living Council. (86 Stat. 146.)

[8] The United States relies on (1) the administrative construction of the act prior to the adoption of the amendments, (2) a report of the Senate Committee on Banking, Housing and Urban Affairs stating the committee had rejected a number of enumerated exemptions, one of which was for state employees, (3) the rejection by the Senate of an amendment dealing with State employee salaries, and (4) a statement at hearings of the House Committee on Banking and Currency by Chairman Connally of the Cost of Living Council stating the council could regulate state employee salaries.

327 U.S. 92, involving a sale of goods by a state in violation of the Emergency Price Control Act. That act expressly applied to "the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." The court rejected the argument that failure to specifically mention "states" exempted them, concluding the reference to "any other government" included states. (327 U.S., at p. 99.)

The cases stating that an unexpressed intent of Congress to regulate state internal affairs should not be implied do not discuss history of legislative proceedings. The reason may be that the settled rule is not a true rule of construction but is essentially a "housekeeping" one for the drafting of statutes.

Although at an earlier date it might have been argued that extrinsic aids could be used in cases of congressional silence, the now settled rule tells Congress to remain silent when there is no intent to regulate the internal affairs of the states. There is no reason to now conclude silence reflects ambiguity—the condition for resort to extrinsic aids. Having repeatedly advised Congress that failure to expressly mention the states means general legislation will not be applicable to the states' internal affairs, it seems unreasonable for the courts, when Congress has seemingly accepted the invitation to reflect its intent by silence, to repudiate the invitation and conclude there is ambiguity. In the absence of ambiguity, there is no reason to resort to rules of construction and extrinsic aids.[9]

[9] However, assuming that it would be proper to conclude congressional silence creates ambiguity and to resort to extrinsic aids, it is doubtful whether there is sufficient showing to justify inclusion of the states. Before an intent to regulate internal affairs may be inferred in an ambiguous statute, the ambiguity

must be eliminated by resort to the extrinsic aids (Penn Dairies v. Milk Control Comm'n, *supra*, 318 U.S. 261, 276; Parker v. Brown, *supra*, 317 U.S. 341, 351), and it does not appear there has been sufficient showing to eliminate all ambiguity.

There is no showing at all that Congress, when it originally adopted the act, intended it to apply to the states. All matters relied on occurred in late 1971 when Congress amended it and extended its term. Thus, there is no reason to believe that Congress, when it originally passed the act, believed it was applicable to the states. In addition, none of the 1971 amendments contains language reflecting an intent on the part of Congress to make the act applicable to the states.

Although the construction of a statute by the officials charged with its administration is entitled to weight, final responsibility for interpretation of the law rests with the courts, and "an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change." (Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal.2d 753, 756–758; Biddle v. Commissioner (1937) 302 U.S. 573, 582.) Administrative construction is probably entitled to less weight where the question is whether the administrator has usurped power by extending jurisdiction over parties and matters than where the question is whether the administrator has properly exercised his power as to matters and parties clearly within his jurisdiction.

Rejection of a proposed amendment is some evidence that the legislative body did not intend the rejected provisions to be part of the statute, but "caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid." (2A Sutherland, Statutory Construction (4th ed. 1973) § 48.18, pp. 224–225.) The rejection may occur because the bill in substance already includes the provisions of the amendment or because unwritten law would produce the same result without the proposed amendment. (*Id.*) In light of the settled rule discussed above, the latter reason may have weighed heavily in the minds of some or many Senators in rejecting the amendment relating to state employee salaries. Another consideration is that adoption of an amendment is ordinarily viewed as a change in the law (*id.*), and some Senators may have voted against the amendment because to adopt it would have furnished an implication that the act was applicable to states prior thereto. The language of the amendment itself furnishes such implication. Moreover, the amendment would have provided for some regulation of state employee salaries. In the circumstances, rejection of the amendment by the Senate may not be given great weight.

The rejection of exemption for state employee salaries by the Sennate Committee on Banking, Housing and Urban Affairs is

The Ohio Supreme Court has also concluded the act is inapplicable to state salaries. (State, ex rel. Fry v. Ferguson, *supra,* 298 N.E.2d 129, 131.)

In United States of America v. The State of Ohio (25 Oct. 1973) the Temporary Emergency Court of Appeals concluded that Congress intended the act to apply to state salaries. Although recognizing the settled rule excluding internal affairs of the states from general federal statutes, the court relied upon the administrative construction, the statutory history, and the cases of Case v. Bowles, *supra,* 327 U.S. 92, 99, United States v. California, *supra,* 297 U.S. 175, 186, and Northern States Power Co. v. Minnesota

contained in a part of its report where several additional proposed exemptions are also rejected. None of the reasons furnished by the committee for rejecting the exemptions is directed specifically to state employee salaries, and the committee refers to "firms" rather than states. In the absence of specific reasons for rejecting the exemption of state employee salaries, the possibility remains that the exemption was rejected for lack of necessity rather than on the merits. Furthermore, although committee reports are entitled to substantial weight, they ordinarily are not conclusive to the exclusion of other rules of construction. (2A Sutherland, Statutory Construction, *supra,* § 48.06, p. 203.)

A substantial argument might be made that viewed together the committee report and the proceedings on the proposed amendment, in light of the administrative construction, eliminates ambiguity as to the intent of the Senate. However, these matters are not decisive. Whatever the merits of the showing of intent of the Senate, the House proceedings do not furnish justification for departure from the settle rules.

The principal matter relied upon by the United States with respect to the House is a statement made during committee hearings by Chairman Connally of the Cost of Living Council that the act is applicable to state employee salaries. Ordinarily statements made by witnesses at committee hearings as to the nature and effect of a bill are not accorded any weight by the courts. (2A Sutherland, Statutory Construction, *supra,* § 48.10, pp. 209–210.) Although the testimony of the administrator may be entitled to some weight, it is insufficient to constitute a compelling showing.

(8th Cir. 1971) 447 F.2d 1147–1148. Administrative construction and statutory history have been discussed. (See fn. 9.) *Case*, as pointed out above, involved a statute expressly mentioning the United States and "any other government"; and *United States* v. *California* involved a proprietary activity, railroads, historically regulated by the federal government.

The remaining case, Northern States Power Co. v. Minnesota, *supra*, involves the question whether federal statutes regulating leaks of radioactive effluents of power plants were intended to occupy the field to the exclusion of state regulation. Although cases dealing with the occupation-of-the-field doctrine also involve federal-state relationships, they are not in point here. In such cases, it is clear that the federal government has entered the field sought to be regulated by the state, and the question is whether all state regulation is thereby preempted, whereas the question in the instant case is whether Congress has intended to *enter* the field of state salaries.

Moreover, absurd consequences would follow from a conclusion that Congress has occupied the field. Such conclusion would mean that the federal government has taken over all regulation of state salaries and state prices so that the legislatures of the states could no longer act in the field. The reasoning of the temporary emergency court leading to such preposterous results must be rejected.

Let a peremptory writ of mandate issue as prayed.

CLARK, J.

WE CONCUR:

McCOMB, J.

BURKE, J.

CONCURRING OPINION BY MOSK, J.

I concur in the judgment.

While it may be late in the constitutional day to raise the issue, my unyielding respect for the traditional federalism upon which our republic was established impels me to reach agreement with the majority result solely on the basis of the Tenth Amendment to the Constitution. For the same reason I find no merit in the jurisdictional point raised by the dissent. My position is substantially that of Justices Douglas and Stewart, dissenting in Maryland v. Wirtz (1968) 392 U.S. 183, 201.[1]

The asserted power of the federal government over state government salaries in this case rests upon the commerce clause and may be exercised only if some relationship can be demonstrated to exist between the activity to be regulated and interstate commerce. If the state acts in a proprietary capacity, usually some such relationship, albeit tenuous, can be found. Employees of Dept. of Public Health & Welf. v. Missouri (1973) 93 S.Ct. 1614.) Under those circumstances the distinction is between "the State as government and the State as trader" (New York v. United States (1946) 326 U.S. 572, 579). Certainly if federal funds are involved, as e.g., for highway construction and maintenance, the employees paid by or expending

[1] The majority opinion in Maryland v. Wirtz did not disagree with the dissenting justices on principle. Justice Harlan for the majority found that the labor conditions in the institutions involved "can affect commerce." He concluded that "while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." (392 U.S. at pp. 196–197.)

such funds—even though their immediate employer is the state—may be subject to acts of Congress. (Oklahoma v. Civil Service Comm'n. (1947) 330 U.S. 127, 142.)

But if all employees of the state—including those occupying purely governmental positions created by the state, paid with funds raised by the state, performing services entirely intrastate in character—are subject to whimsical control of the Congress and federal administrative agencies, "then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." (Douglas, J., dissenting in Maryland v. Wirtz, supra, at p. 205.) Chief Justice Stone also warned, concurring in New York v. United States, supra, at page 587, that the national government may not "interfere unduly with the State's performance of its sovereign functions of government."

Ever since Chief Justice Marshall sustained reciprocal immunity of the state and federal governments from intergovernmental taxation in McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 316, 429–430, it should have been clear that the "notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." (Douglas and Black, JJ., dissenting, New York v. United States, supra, at p. 594.) A number of high court opinions have spoken in generality of the merits inherent in a healthy federalism. (See, e.g., Powell, J., concurring in Johnson v. Louisiana (1972) 406 U.S. 356, 376; Harlan, J., dissenting in Duncan v. Lousiana (1968) 391 U.S. 145, 172; Goldberg, J., concurring in Pointer v. Texas (1965) 380 U.S. 400, 414; Clark, J., in Ker v. California (1963) 374 U.S. 23, 31.) In Atlantic C.L.R. Co. v. Engineers (1970) 398 U.S. 281, 285, Justice Black, speaking for the court reminded us: "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrended were retained by the States . . . ."

One need not disparage the motive of achieving national economic stability, as Chief Justice Hughes pointed out in Schechter Corp. v. United States (1935) 295 U.S. 495, 550, to deny to the federal government the right to fix wages in an intrastate enterprise. For however laudable the statutory purpose, Justice Cardozo taught us, "the Tenth Amendment preserves a field of autonomy against federal encroachment." (Hopkins Savings Assn. v. Cleary (1935) 296 U.S. 315, 337.)

Some contemporary authorities, considered during the exigencies of the second world war, have reached contrary conclusions in circumstances somewhat analogous to the facts in this case. Unfortunately the imperatives of concentrated bigness—our national dimension in geography, population, industry, labor, technology—have resulted in a correlative concentration of power in the biggest government. Perhaps the trend toward centralized authority and judicial acquiescence in it are irreversible (but see Harlan, J., concurring and dissenting in Williams v. Florida (1970) 399 U.S. 78, 133); nevertheless I suggest that a fait accompli is not necessarily desirable or constitutionally permissible. Expediency must never cause us to abdicate our responsibility to hold even generally accepted concepts up to the light of constitutional scrutiny.

If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus this could be a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency.

We issued an alternative writ of mandate. The respondent State of California, exercising the sovereign power reserved to it under the Tenth Amendment, should have responded by performing the acts incident to state sovereignty: paying the funds provided in the California Budget Act of 1973. Since the State failed to do so, a peremptory writ of mandate becomes necessary.

MOSK, *J.*

DISSENTING OPINION BY SULLIVAN, J.

I dissent. This court does not have jurisdiction of the subject matter of these proceedings.

Section 211 of the Economic Stabilization Act (the Act) unequivocally provides that "[t]he district courts of the United States shall have *exclusive* original jurisdiction of cases or controversies *arising under* this title, or under regulations or orders issued

thereunder . . ."[1] (Italics added.) The sole question to be answered in order to determine the jurisdictional issue is whether this is a case or controversy "arising under" the Act.

In paragraph V of the petition for writ of mandate, it is alleged that Congress, in enacting the Economic Stabilization Act, "did not grant authority to the President or any federal administrative body to regulate or control the internal affairs of sovereign states of the United States"; that the Cost of Living Council, Office of Wage Stabilization ordered the Governor not to carry out the salary increases except as authorized by the council; and that "[n]otwithstanding the lack of constitutional authority on the part of the Cost of Living Council, Office of Wage Stabilization, to promulgate and enforce such an order, respondents have obeyed, and threaten to continue to obey, such order, all in violation of their legal duties. . . ." In view of these allegations, as will be shown, I conclude that this case does indeed arise under the Act and therefore falls within the provisions of section 211.

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[1] This section further provides that any court of competent jurisdiction may "hear, and determine any issue *by way of defense* (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue *by way of defense* is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States . . . ." (Italics added.) As will be shown, however, this proviso is not applicable here since the petition for writ of mandate *initially* raises the question of the validity of the Act as applied to state employees' salaries and the constitutionality of the Cost of Living Council's order issued thereunder.

To determine the meaning of "arising under" it is helpful to review some decisions interpreting section 1331, subdivision (a), of title 28 of the United States Code. This subdivision, setting forth the requirements for "federal question" jurisdiction, provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . *arises under* the Constitution, laws, or treaties of the United States."[2] (Italics added.) Starin v. New York (1885) 115 U.S. 248, a leading case on federal question jurisdiction, provides a clear insight into the meaning of the critical words: "If from the questions it appears that some title, right, privilege, or immunity, on which recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one *arising under* the Constitution or laws of the United States . . . ." (*Id.* at p. 257, italics added.)

Later federal cases supply us with more detailed explanations as to whether a case arises under federal law. In Eastern Air Lines, Inc. v. Flight Engineers Internat'l. Ass'n (5th Cir. 1965) 340 F.2d 104, cert. denied, 382 U.S. 811, the court quoted from earlier cases the "test of federal jurisdiction where it is asserted under the 'federal question' section. . . . 'The

[2] The fact that this section does not confer *exclusive* jurisdiction in the federal courts is of no significance here, since we are investigating only the meaning of "arising under." Thus, where federal jurisdiction is asserted under 28 United States Code section 1331, subdivision (a), the action *may* be brought in federal court; in an action arising under the Economic Stabilization Act, the suit *must* be brought in federal court. The meaning of "arising under" remains constant.

test is the familiar one that *it must appear from the complaint* that the construction of a federal statute will have an adverse effect on the right of recovery if the statute is construed [in] one rather than another way." (*Id.* at p. 106, italics added.) And in Ivy Broadcasting Co. v. American Tel. & Tel. Co. (2d Cir. 1968) 391 F.2d 486, the court clearly indicates that an action brought to enforce a "federal right" is not a prerequisite to federal question jurisdiction. "The test we have stated for determining whether a complaint presents a federal question is . . . *whether a properly pleaded 'state created' claim itself presents a 'pivotal question of federal law,' for example because an act of Congress must be construed* or ' " federal common law" govern[s] some disputed aspect' of the claim." (*Ivy,* supra, at p. 489); italics added.) The court continued: "A case may 'arise under' federal law, even though the claim is created by state law, if the complaint discloses a need for the interpretation of an act of Congress." (*Id.* at p. 492.)

The posture of the case before us clearly meets the test as defined in *Ivy.* In their application for a writ of mandate, petitioners allege that the Budget Act of 1973 provides for specified salary increases for all state employees; that the Cost of Living Council, Office of Wage Stabilization ordered respondents State of California and Governor Reagan to withhold all such wage and salary increases in excess of those permitted by the council; that the United States Congress, in enacting the Economic Stabilization Act of 1970 did not grant authority to the President or any federal administrative agency to regulate or control the internal affairs of the sovereign states; that not-

withstanding the lack of constitutional authority on the part of the Cost of Living Council, the various respondents have obeyed its order; and that respondents have failed to comply with their respective legal duties and have wrongfully refused to carry out the Budget Act by not processing the salary increases. To put it another way the issues of the constitutionality of the Economic Stabilization Act and of its validity as applied to state employees are raised by petitioners; they are not interposed by way of defense. Thus by the very language of the petition, the outcome of the instant proceedings depends on a determination which must be made as to the constitutionality and validity of the Act. As in *Ivy*, petitioners have brought a special proceeding of a civil nature (Code Civ Proc., § 1085) based on a "state created claim" which itself "presents a 'pivotal question of federal law,' . . . because an act of Congress must be construed . . . ." It is clear that the case before us arises under the Act, and we are therefore precluded from assuming jurisdiction since section 211 of the Act expressly reserves adjudication of such issues to the federal courts.[3]

[3] In his dissenting opinion Justice Tobriner suggests that because petitioners could have established a "facially sufficient claim for relief" * without referring "to the existence and validity of the order of the Cost of Living Council," the instant action does not " 'aris[e] under' the stabilization act or a regulation or order issued pursuant thereto." ** However, as the Supreme Court noted in Gully v. First National Bank (1936) 299 U.S. 109, cited by Justice Tobriner, it is rather futile to "attempt to define a 'cause of action' without reference to [its] context." What is called for is "something of that common sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." The court concluded: "To set bounds to the pursuit, the courts have formulated the distinctions between controversies that are basic and those that are collateral . . . ." (*Gully, supra*, at pp. 117–118, passim.) In the instant case, petitioners are aggrieved for only one reason—the Cost of Living Council has ordered the Governor not to carry out the salary increases except as authorized by the Council . . . and that . . . respondents have obeyed, and threaten to continue to obey, such order . . . ." (Petition for writ of mandate.) It it pellucid that, regardless of the language by which petitioners seek redress of this grievance, the basic controversy presented by their petition necessarily involves the validity of the federal agency's order. (See, e.g., Simpson v. Southwestern Railroad Company (5th Cir. 1956) 231 F.2d 59.) I do not believe that we should simply close our eyes to this, the essential context of the matter before us. To do so would be to abdicate the duty enjoined upon us by the decision in *Gully* to appreciate the context of the cause with a view towards distinguishing the controversies that are basic from those that are collateral. Indeed it was quite apparent at oral argument that in essence the petition was a challenge to the legal authority of the Cost of Living Council and that contrary to the speculation of Justice Tobriner's dissent, petitioners would not have been content with alleging merely that each of them "was a state employee entitled to the full pay increase prescribed by the the California Budget Act of 1973." *

* Dissenting opinion by Tobriner, J., *post*, at p. 5.

** Dissenting opinion by Tobriner, J., *post*, at p. 5.

The majority take the position that we have jurisdiction, relying on the recent case of Employees v. Missouri Public Health Dept. (1973) 411 U.S. 279, in which the Supreme Court held that a nonconsenting state could not be subjected to a suit in a federal court brought by its citizens, absent express language to that effect in a federal statute. Thus, the majority argue, we must have jurisdiction in the instant matter since otherwise the state employee would be deprived of any forum in which to litigate their cause. I find this rationale unconvincing. I know of no barrier which would preclude the State of California from bringing suit against the United States or the

appropriate federal agency in the United States District Court for proper adjudication of the question.[4] Further, there is every indication that the state would be willing to pursue this remedy on behalf of its employees, or in the alternative, to consent to a suit brought by the employees in federal court.[5]

In *Missouri* it was stated that we cannot by implication assume an intent on the part of Congress to subject a state to a federal remedy, where one is not expressly provided. By the same token, when Congress explicitly states that the federal courts shall

[4] Indeed, according to exhibits recently lodged in this court by the Attorney General, the state following oral argument in this case *has* initiated a proceeding in the United States District Court for the Eastern District of California seeking to raise the very constitutional issues which it would have us decide in this case. Named as defendants in the new action are the United States, the council, the council's director, and his counselor. In addition to the state, named plaintiffs include a state employee "who brings this action on behalf of himself and all others similarly situated." In view of this development, the statements of the majority citing the employees' lack of another forum as a reason for exercising *original* state jurisdiction take on a particularly hollow ring. It is also interesting to note that in the new federal action jurisdiction is based in part on section 211 of the Act, which, according to the complaint, "vests exclusive original jurisdiction of cases or controversies arising under the Act or regulations or orders issued thereunder, in the District Courts of the United States."

[5] Respondents have made a return to the alternative writ of mandate by way of demurrer and answer. It is noteworthy that in their supporting memorandum of points and authorities respondents state: "By their Answer, respondents have admitted the great majority of the allegations raised in the Petition, including the contention that the United States Congress did not grant authority to the President or any federal administrative body to regulate or control the internal affairs of California, a sovereign state. [Fn. omitted.] Similarly, respondents are in accord with petitioners concerning the irreparable injury suffered by all state employees by reason of the recent actions of the Cost of Living Council. To alleviate such gross inequities, respondent are actively pursuing all available federal remedies . . . ."

have exclusive original jurisdiction, we cannot imply, as do the majority, that this was not the meaning intended by Congress merely because certain persons may be left with no direct remedy against a state. It cannot be doubted that Congess has the *power* to reserve exclusive jurisdiction in the federal courts in cases and controversies arising under the Constitution or laws of the United States. (Bowles v. Willingham (1943) 321 U.S. 503, 511–512.) When this power is clearly exercised, as it is in section 211 of the Act, any attempt to override such instructions from Congress is forbidden by the supremacy clause of the Constitution of the United States. (U.S. Const., art. VI, § 2.)

The majority claim that there is a further reason ("although not necessarily determinative") why the jurisdiction provisions of section 211 of the Act are not applicable here. They argue that the Act itself does not apply to state employees' salaries and that therefore the jurisdictional provisions of the Act cannot apply to the instant case. This reasoning is clearly faulty.

Subject matter jurisdiction has been defined as the "power to hear or determine the case." (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288.) Without that power, a court is not competent to adjudicate the substantive issues before it. Thus, where a statute by its terms reserves jurisdiction of any case arising thereunder to the federal courts, a state court cannot first decide that the statute is inapplicable to a given controversy and thereby circumvent the jurisdictional restrictions in the statute itself. That such a result is incongruous is particularly evident where, as here, the applicability of the statute

is the central substantive issue of the case. The majority would have us decide the substantive issue before determining whether we have the power to make such a decision. I conclude therefore that irrespective of the merits of the petition, we are bound by the supreme law of the land (U.S. Const., art. VI, § 2) to dismiss it since it is clear that we do not have jurisdiction of the matter.

Further, even if it be assumed for the sake of argument that this court possesses some sort of residuary jurisdiction over the subject matter of this proceeding, we should nevertheless as a matter of sound judicial policy decline to exercise our original jurisdiction in the circumstances (see Cal. Const., art. vi, § 10). Having disposed of the jurisdictional issue, the majority proceed to determine what they choose to denominate the substantive issue of the validity of the Act as applied to state employees' salaries. But the plain fact is that there is no substantive issue for us to decide since by their answer, respondents have admitted petitioners' allegations that Congress did not grant authority to the President or to any federal agency to regulate the internal affairs of a sovereign state. The sole allegation put in issue by respondents' return to the alternative writ is the question of jurisdiction; this issue having been determined, no controversy between the parties remains to be decided.[6] That portion of the majority opinion dealing with the application of the Act is therefore merely advisory, and thus in excess of jurisdiction, since "[t]he rendering of advisory opinions falls

[6] The United States was denied permission to intervene in these proceedings, but was allowed to file an amicus curiae brief. The United States Attorney participated in the oral argument, contending inter alia that the Act does in fact apply to California state employees.

within neither the functions nor the jurisdiction of this court." (People v. Superior Court (1970) 1 Cal.3d 910, 912.)

This view of the posture of this case is further borne out by statements made at oral argument by the Attorney General. In answer to the court's question whether this was indeed an adversary proceeding, the Attorney General replied, "That's a good question," and later stated: "I felt that it was necessary that in order to have some type of an adversary proceeding here . . . that the United States should be allowed to present their arguments here." Clearly, then, except for the question of subject matter jurisdiction raised by respondents by way of demurrer, the parties to the action are in agreement. As to the substantive matters there is no controversy to be considered and determined by this court. For this court to issue the writ of mandate which *both* parties seek is simply to allow ourselves to be used for the purpose of providing our imprimatur to the parties' agreed position. This we should emphatically refuse to do.

Respondents have been ordered by the Cost of Living Council *not* to pay wage and salary increases except to the extent permitted by the council. Faced with the stern sanctions of the Act for failure to obey this order, respondents curiously seem content to seek comfort in a judgment rendered in a proceeding which is not adversary in nature—indeed in which they appear to be in complete agreement with petitioners. I fail to see how any such judgment carries the hallmark of a contested case "pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision *from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting*

and demanding interests, . . ." (United States v. Fruehauf (1961) 365 U.S. 146, 157; italics added.)

In summary, I conclude that we have no jurisdiction to decide the case at bench since according to the clear language of the federal statute all cases arising under the Act must be brought in the United States District Courts. Moreover, even on the assumption that we did have jurisdiction of the subject matter, I am of the view that this is not a case in which we should exercise our original jurisdiction. Accordingly, I would discharge the alternative writ of mandate and dismiss the petition for the peremptory writ.

SULLIVAN, J.

I concur:

WRIGHT, C.J.

DISSENTING OPINION BY TOBRINER, J.

I dissent.

Although I believe that this court has jurisdiction over the subject matter of this proceeding, I am convinced both that Congress has the power to limit state employee salary increases and that Congress intended the President and his administrative delegatees to possess this power.

Respecting, first, the jurisdictional issue, I concur with the majority's conclusion that this controversy falls outside the scope of exclusive federal district court jurisdiction. Section 210, subdivision (a), of the Economic Stabilization Act, the focus of much attention in the majority's opinion, appears intended merely to eliminate the amount-in-controversy requirement that a stabilization act claimant would have to satisfy were he to found a federal court action upon

the general federal question jurisdictional statute. (28 U.S.C. § 1331, subd. (a).) Nothing within section 210, subdivision (a), suggests that Congress intended to prevent state courts from entertaining suits raising claims under the stabilization act.[1]

Section 211, subdivision (a), on the other hand, draws a distinction between actions "arising under" the act or related regulations and actions in which the constitutionality of the act or the validity of related agency action is raised by way of defense. Congress appears to have intended that federal district courts should have exclusive original jurisdiction over those cases which "aris[e] under" the federal stabilization laws and regulations but not those in which issues concerning the validity of the stabilization act or related executive branch action are introduced by the defense.[2] Although Justice Sullivan points out that plaintiff Coan alleged in his mandate petition that the stabilization act did not delegate the authority to regulate state salaries, I am convinced that the presence of this allegation in his petition does not render this controversy one that "aris[es] under" the act or

[1] I thus find it unnecessary to confront the implications of Employees of Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare (1973) 411 U.S. 279, discussed in the majority opinion and Justice Sullivan's dissent.

[2] Section 211, subdivision (a), directs that federal district courts "shall have exclusive original jurisdiction of cases or controversies arising under [the stabilization act], or under regulations or orders issued thereunder." The provision further declares that "[i]f in any . . . proceeding [before "any court of competent jurisdiction"] an issue by way of defense is raised based on the constitutionality of [the stabilization act] or the validity of agency action under [the act], the case shall be subject to removal by either party to a district court of the United States." This removal prescription would be superfluous if state courts could not entertain cases in which questions concerning the constitutionality of the stabilization act or the validity of agency action taken pursuant thereto were raised by way of defense.

related regulations and orders.

It has long been established in the context of determining whether a federal district court has original federal question jurisdiction under United States Code, title 28, section 1331, subdivision (a), that a plaintiff cannot affect jurisdictional boundaries by anticipatorily pleading federal defenses. (E.g., Gully v. First National Bank (1936) 299 U.S. 109, 112–113; White v. Sparkill Realty Corp. (1930) 280 U.S. 500, 512; Louisville & Nashville R.R. v. Mottley (1908) 211 U.S. 149, 152–154. See also Bator, Mishkin, Shapiro & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System (2d ed. 1973) pp. 883–885; Wright, Federal Courts (1963) § 18, pp. 52–55; Mishkin, *The Federal "Question" in the District Courts* (1953) 53 Colum.L.Rev. 157, 164, 176–184.) Although Justice Sullivan correctly observes that an action "arises under" federal law if the federal issue "appear[s] from the complaint" (Eastern Air Lines, Inc. v. Flight Engineers International Ass'n (5th Cir. 1965) 340 F.2d 104, 106, cert. den., 382 U.S. 811, quoting Dickson v. Edwards (5th Cir. 1961) 293 F.2d 211, 215), the complaint must be properly composed; it may not include material unnecessary to establish plaintiff's claim for relief.[3] (See Marshall v. Desert

[3] Justice Sullivan's reliance upon Ivy Broadcasting Co. v. American Tel. & Tel. Co. (1968) 391 F.2d 486, I believe, is misplaced. In *Ivy*, federal district court federal question jurisdiction was based upon the conclusion that the duties which plaintiff claimed defendants had breached were established and governed solely by federal law. (*Id.* at p. 491.) The case does not stand for the proposition that all "state created" claims presenting "pivotal questions of federal law" qualify for federal district court original jurisdiction, since the *Ivy* court itself acknowledged that such claims need be "properly pleaded." (*Id.* at p. 489, quoting McFaddin Express, Inc. v. Adley Corp. (2d Cir. 1965) 346 F.2d 424, 426, cert. den., 382 U.S. 1026.)

Properties Co. (9th Cir. 1939) 103 F.2d 551, 552, cert. den., 308 U.S. 563.) And although the case before us concerns the jurisdiction of a state rather than a federal court, I discern no dispositive reason why the anticipatory defense principle should not apply in the present context. Just as an aspiring federal court plaintiff cannot affect jurisdictional boundaries by prematurely interjecting federal defenses, so a resistant state court defendant cannot affect jurisdictional boundaries by exploiting the verbosity of its adversary.

All that plaintiff Coan need have alleged to establish a facially sufficient claim for relief was that he was a state employee entitled to the full pay increase prescribed by the California Budget Act of 1973. Reference in his petition to the existence and validity of the order of the Cost of Living Council was unnecessary to a complete description of his claim. His action thus cannot be said to "aris[e] under" the stabilization act or a regulation or order issued pursuant thereto.[4] I conclude, therefore, that we possess the requisite jurisdiction over the subject matter.

Turning next to the question whether Congress has the power to limit state employee salary increases, I submit that it does. (See California Teachers Ass'n

[4] Professor Mishkin has observed with respect to federal district court federal question jurisdiction that "[A] contention that a particular state enactment is invalid may be advanced in two ways: as a defense to an action under the statute—*which would be insufficient to ground removal to a lower federal court*; or as the basis for seeking an injunction against action pursuant to that statute—which would put it within the original jurisdiction of a national tribunal." (Mishkin, *supra*, at p. 177 (emphasis added).) Since the removal jurisdiction generally includes only cases which a federal district court could have entertained in the first place, there is no federal question jurisdiction for the former variety of litigation.

v. Newport Mesa Unified School Dist. (C.D.Cal. 1971) 333 F.Supp. 436, 444–445.) The power finds its source in the commerce clause (U.S. Const., art. I, § 8), and the critical inquiry is whether Congress could reasonably have thought that the regulated activities or events substantially affect interstate commerce. (See generally Heart of Atlanta Motel, Inc. v. United States (1964) 379 U.S. 241; Moore v. Mead's Fine Bread Co. (1954) 348 U.S. 115; NLRB v. Jones & Laughlin Steel Corp. (1937) 301 U.S. 1). The validity of the proposition that significant sums of money placed in the hands of large numbers of state employees[5] can have a substantial impact upon national demand and monetary stability is surely obvious. Indeed, the proposition appears jurisprudentially unimpeachable in light of the United States Supreme Court's celebrated holding that personal consumption of home-grown wheat by farmers can sufficiently affect interstate markets to justify congressional regulation of the wheat consumed. (Wickard v. Filburn (1942) 317 U.S. 111.) To focus upon whether the regulated events physically occur wholly within the borders of a state is to resurrect old and discarded learning. (See, e.g., United States v. E. C. Knight Co. (1895) 156 U.S. 1. Cf. Hopkins v. United States (1898) 171 U.S. 578.) "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." (United States v. Women's Sportswear Manufacturers Ass'n (1949) 336 U.S. 460, 464; see also Heart of Atlanta Motel, Inc. v. United States, *supra*, at pp. 268, 271; United States v. Darby (1941) 312 U.S. 100, 119.)

Nor do I believe that the Tenth Amendment and

[5] See footnote 7, *infra*.

the fact that the regulatee is a state sovereign preclude congressional regulation in this instance. To be sure, there may be special limits upon the ambit of Congress' commerce clause power with respect to the activities of state governments (see Maryland v. Wirtz (1968) 392 U.S. 183, 204–205 (Douglas, J., dissenting); Note, *State Sovereignty as a Limitation upon the Federal Commerce Power* (1936) 45 Yale L.J. 1118), just as there are limits on Congress' ability to affect such activities by exercising its article 1, section 8 powers to "provide" for the "general welfare" (see generally United States v. Butler (1936) 297 U.S. 1; but cf. Oklahoma v. Civil Service Commission (1947) 330 U.S. 127; Steward Machine Co. v. Davis (1937) 301 U.S. 548), and "lay and collect taxes." (See generally New York v. United States (1946) 326 U.S. 572; Metcalf & Eddy v. Mitchell (1926) 269 U.S. 514.)

I concede, in short, that a balance must be be struck between the interests which support the federal regulatory power and the need to minimize interference with the essential functions of state government. But the locus of this balance is not best discovered by invoking a specter of destruction of state government by Congress. Although Chief Justice Marshall was correct that "the power to tax involves the power to destroy" (McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 315, 429), the reasoning underlying Justice Holmes' admonition "not . . . while [the United States Supreme Court] sits" (Panhandle Oil Co. v. Mississippi (1928) 277 U.S. 218, 223 (dissenting opinion) reveals the essence of the task. (See also New York v. United States, *supra*, at pp. 577, 583.) Courts, in part, are in the very business of striking balances and are sufficiently capable of insuring that

principles and positions are not extrapolated to unjustifiable extremes.

Fully cognizant, then, of the importance of preserving viable state government, I nevertheless submit that the present situation is not one in which congressional action poses a threat to the life or integrity of our 50 state sovereigns. As far as I can discern, a state's principal interest in raising its employees' salaries is based on its need to compete effectively with private industry for qualified personnel. As long, however, as the federal government properly controls the salaries of private employees, there is little reason to fear that private salaries will increase faster than state salaries.

A state may further have an interest in seeing that its employees are well paid and comfortable. Since, however, a state has a similar interest in the welfare of privately employed persons and since this latter interest does not preclude federal control of private salaries, there can be no claim that a state's interest in the welfare of those it employs precludes congressional control of their salaries. I conclude, therefore, that although the target of federal regulation is an activity of state government, the regulation does not interfere unacceptably with state sovereignty *in this instance*.

Confronting, finally, the question of congressional purpose, I do not agree with the majority's conclusion that Congress did not intend to delegate the power to control state employee salary increases. Although the majority is correct that "an unexpressed purpose of Congress to set aside state regulation of internal affairs is not lightly to be inferred" (see, e.g., Penn Dairies, Inc. v. Milk Control Commission (1943)

318 U.S. 261, 275; Parker v. Brown (1943) 317 U.S. 341, 351), the present situation seems to be one in which such an inference is proper.[6]

A primary purpose of the stabilization act, as stated in its section 202, is to "stabilize the economy [and] reduce inflation" in part by "stabiliz[ing] . . . wages [and] salaries." (See Amalgamated Meat Cutters & Butcher Workmen v. Connally (D.D.C. 1971) 337 F.Supp. 737, 749.) Given this purpose, I have great difficulty believing that Congress intended to exempt the salaries of the nation's more than 10 million state and local governmental employees[7] without clarifying this intention either with explicit statutory language or at least some exposition to this effect in the legislative record.[8] Because large accessions of disposable income in the hands of so substantial a segment of the labor force could significantly affect demand and monetary stability, I cannot assume

[6] Because the threat posed by federal regulation to the viability and effectiveness of state government appears minimal in this instance, I believe the force of the presumption invoked by the majority should be correspondingly lessened.

[7] In 1972, state and local governments employed approximately 10,809,000 persons in the United States. (U.S. Dept. of Commerce, Statistical Abstract (94th ed. 1973) p. 433.) This figure was smaller but of a similar magnitude when Congress delegated wage-control powers to the executive branch.

[8] Indeed, the legislative record reflects a contrary intention. (See, e.g., Sen. Rep. No. 92-507, 2 U.S. Code Cong. & Admin. News (92d Cong., 1st Sess. 1971) pp. 2283, 2286; Remarks of Senators Sparkman (Chairman of the Sen. Committee on Banking, Housing and Urban Affairs) and Tower, 117 Cong. Rec. (1971) 43,674–43,676; cf. Hearings before the House Committee on Banking and Currency, Oversight Hearings on the Operation of the Economic Stabilization Act of 1970, 92d Cong., 1st Sess., pt. I, pp. 202, 208, 232, 249.)

The majority takes the view that resort to the legislative record is improper because the stabilization act is unambiguous with respect to state employees' salaries. I cannot agree. The act

without basis that Congress intended to deny the executive branch the flexibility to prevent such accessions.[9]

Moreover, were state employees' salaries left unregulated, the federal government might encounter difficulty enforcing controls on private salaries. Critical to the success of much economic regulation is that the regulated parties must be convinced that they are receiving equitable treatment. Were state employees' salaries left free to rise, many private employees might resist controls placed on their salaries. (Cf. Davies Warehouse Co. v. Bowles (1944) 321 U.S. 144, 157–158 (Douglas, J., dissenting); Remarks of Senator Tower, 117 Cong. Record (1971) 43,674.)

The majority's assurance that the pocketbook concerns of state taxpayers afford a sufficient restraint on salaries like that of plaintiff Coan fails to remove doubts that Congress intended to leave such salaries unregulable. State employees typically maintain potent legislative lobbies, and at least two states—California and Ohio—have adopted pay increases which the presumably expert federal administrators later determined were unacceptably inflationary. Nor does

merely delegates the power to stabilize wages and salaries; it does not specify whose wages and salaries are regulable. Nor, I believe, is the matter clarified by any presumption erected by case law, since 35 senators, convinced that state employees' salaries should be exempt from controls, felt it necessary or at least desirable that this intention be explicitly articulated in the act. (See p. 15 and fn. 10, *infra*.) Senators who desired that state employees' salaries be made regulable may also have felt explicit exemption to be the preferable mode of statutory composition.

[9] The precise issue before us is not whether Congress wanted state employees' salaries controlled, but whether Congress wanted the President and his administrative delegatees *to have the option* to control these salaries should the fluid economic situation evolve in a manner dictating such control.

the fact that a California statute commands the State Personnel Board to consider salary levels in the private sector when adjusting salary ranges for state civil service employees (Gov. Code, § 18850) squarely reach the issue. We are concerned, here, with Congress' intent with respect to the entire nation and cannot assume that Congress was willing to rely upon California law and whatever similar prescriptions operate in other states to restrain public employees' salaries.

I conclude, in sum, that Congress intended that state employees' compensation should be amenable to federal control so that Congress could accomplish the objectives of the stabilization act. As acknowledged by the majority, federal legislation must be read to apply to the activities of state governments, absent congressional instruction to the contrary, when such application appears necessary to effectuate the legislation's purposes. (See generally California v. United States (1944) 320 U.S. 577, 585–586; United States v. California (1936) 297 U.S. 175, 185–187; 3 Sutherland, Statutes and Statutory Construction (3d ed. 1943) § 6302, pp. 192–193.)

The majority nevertheless takes the position and apparently finds dispositive that through its opinions, the United States Supreme Court has instructed Congress that the judiciary will not apply federal legislation to the activities of state governments unless Congress explicitly mandates this result. Congress however, appears to have ignored this instruction at least in the present instance. I draw this inference from the fact that both the Senate and its Committee on Banking, Housing and Urban Affairs rejected proposals which would have explicitly exempted state em-

ployees' salaries from control. One can speculate, of course, that these rejections do not indicate the Senate's desire to give the President and his delegatees the power to regulate state salaries but rather reflect the Senate's belief that an explicit exemption would have been redundant given the presumption that state activities are unaffected when a statute fails to address the issue. To so conclude, however, is to assume that the many senators who supported the exemption proposals [10] failed to accept or comprehend the Supreme Court's message. Such a conclusion also ascribes unlikely motives to the senators who rejected the proposals.[11] A more probable explanation is that the Senate and its committee disapproved explicit exemption because they intended that state employees' salaries should be regulable. (Cf. California v. Taylor (1957) 353 U.S. 553, 564–565.)

In the end, I fear that the majority may have been influenced by a belief that California's state employees deserve the full raises prescribed by the Budget Act of 1973. Our task, however, is to ascertain the power and intent of Congress, not to pass on the economics

[10] Thirty-five senators voted in favor of an amendment tendered by Senator Proxmire which would have exempted state and local employees' salaries from agency control. (See 117 Cong. Rec. (1971) 46,673.)

[11] As mentioned, one possibility is that the senators who rejected the exemption amendments wished to minimize statutory verbiage. That some senators would weigh this interest more heavily than the need to clarify ambiguity (see fn. 8, *supra*) I find extremely unlikely. Alternatively, the senators voting to reject might have been concerned that an exemption amendment would have incorrectly suggested that Congress wished to modify the coverage of the original stabilization act. This concern could have been eliminated by rewording the amendment, however, such that I find this too to be an unlikely explanation for the rejection.

or equity of a particular pay increase. The latter is the function of the Cost of Living Council and the subject of whatever appeals lie therefrom.

I would deny the relief requested.

TOBRINER, J.